STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2010
v	No. 290286 Oakland Circuit Court
PHILLIP LYNN MOSHER, Defendant-Appellant.	LC No. 2008-220908-FC

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under 13), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13).[1] Defendant was sentenced to 210 months to 50 years' imprisonment for one of the first-degree criminal sexual conduct convictions and 25 to 50 years' imprisonment for the other two first-degree criminal sexual conduct convictions. Defendant was also sentenced to 10 to 15 years' imprisonment for the two second-degree criminal sexual conduct convictions. We affirm.

A. DEFENDANT'S STATEMENT TO POLICE

Defendant first argues that portions of an interview between him and the Michigan State Police were inadmissible, requiring a new trial. We disagree.

This unpreserved issue is reviewed for plain error affecting substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). Under the plain error rule, defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Furthermore, reversal is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

[1] Defendant was charged with a third count of second-degree criminal sexual conduct, but was acquitted by the jury of that particular count.

Defendant claims that portions of his police interview were inadmissible because the prosecution failed to provide a statutorily required notice prior to its proffer in court. Specifically, defendant takes issue with the portions of the interview where (1) Sergeant Gary Muir asked defendant about two alleged sexual assaults involving the victim in Hillsdale, Michigan, (2) defendant admitted to touching the victim's mother, R.Y. on the breast when she was a child, and (3) Sergeant Muir asked defendant about an alleged sexual assault involving another granddaughter. MCL 768.27a requires the prosecution to "disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered." It is not disputed that the prosecution provided a copy of the interview transcript to defendant at least 15 days before trial.[2] However,, defendant argues that he should have received explicit "notice" that the evidence was going to be used in accordance with MCL 768.27a. The plain language of the statute only requires that the evidence be *disclosed* to defendant. Since the entire transcript was disclosed to defendant at least 15 days before trial started, defendant's argument based on a lack of "notice" fails.

Defendant next claims that his statement in the interview, where he voiced his opinion that neither touching a minor's breast nor oral-vaginal contact with a minor should be considered rape as it was instead a molestation, was inadmissible because it was irrelevant and, in any event, more unfairly prejudicial than probative, in violation of MRE 403.

Relevant evidence is evidence that has *any tendency* to make the existence of any material fact or issue at trial more or less probable than it would be without the evidence. MRE 401; *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Defendant's statements could be construed as showing that he thought this type of behavior was less morally reprehensible than other assaultive behavior, which, in turn, would have some tendency to show that it was more likely that defendant would engage in such acts. Thus, the statements were relevant.

However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Here, in this unpreserved issue, defendant failed to show how the evidence was given undue or preemptive weight or that its probative value was marginal. The admission went to defendant's state of mind regarding the conduct at issue in the trial, not some collateral matter.

Moreover, even if the statement was erroneously admitted, defendant cannot establish plain error. The statement did not affect a substantial right because it would have had little impact on the jury since it came across as a matter of semantics between defendant and Sergeant Muir, where defendant claimed that the conduct in question was not "rape" but, instead, agreed that the conduct was inappropriate "touching" and "molestation." Moreover, as a result of the

[2] The lower court record shows that defendant filed a motion, which was dated October 13, 2008, to suppress the interview. The motion itself had a transcript of the interview attached as an exhibit. The trial started 15 days later on October 28, 2008.

victim's testimony and defendant's own admissions in the taped phone conversations, defendant cannot show that he was actually innocent or any error affected the fairness, integrity, or public reputation of the trial. Thus, defendant's unpreserved claim fails.

B. MCL 768.27a

Defendant argues that evidence of any past sexual assaults on R.Y. were inadmissible, requiring a new trial. We disagree. This unpreserved issue is reviewed for plain error affecting substantial rights. *Hawkins*, 245 Mich App at 447.

Defendant first contends that the evidence should have been excluded pursuant to MRE 403. As noted earlier, MRE 403 states that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "The fact that evidence is prejudicial does not make its admission unfair." *People v Murphy (On Remand)*, 282 Mich App 571, 582-583; 766 NW2d 303 (2009). "Unfair prejudice exists only when a probability exists that evidence, which is minimally damaging in logic, will be weighed by the jurors substantially out of proportion to its logically damaging effect or it would be inequitable to allow the proponent of the evidence to use it." *Id.* at 583 (internal quotations omitted).

Here, defendant argues that the prior assaults on R.Y. are so different from the assaults on the victim that they have no bearing in the instant case and should never have been admitted. This argument lacks merit. When applying MRE 403, the fact that defendant never gave money to the victim, never assaulted the victim while she talked on the phone, or ever had penile-vaginal intercourse with the victim is not pertinent. The salient point with the prior assaults is that defendant exhibited a propensity to sexually assault young girls in his care. Additionally, MCL 768.27a explicitly allows propensity evidence in these types of cases involving the sexual assault of minors, when normally MRE 404(b) would not allow it.[3] *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). Defendant's propensity to commit these types of acts is highly probative to the charged offenses. See *People v Mann*, ___ Mich App ___; ___ NW2d ____; 2010 WL 1404410. Since the probative value of the evidence was so high, defendant has failed to show how the jury would have given such evidence any undue weight. Accordingly, defendant's MRE 403 argument fails.

Defendant next contends that MCL 768.27a is an unconstitutional ex post facto law. This argument lacks merit for two reasons. First, this Court has already explicitly determined that MCL 768.27a does not violate any ex post facto restrictions, *Id.* at 619, and this Court is bound by stare decisis to not disturb that decision, MCR 7.215(J)(1); *People v Herrick*, 277 Mich App 255, 258; 744 NW2d 370 (2007). Second, the concept of ex post facto is not even implicated in this case because MCL 768.27a was the law in effect at the time defendant assaulted the victim in 2007.[4] See *People v Stevenson*, 416 Mich 383, 396; 331 NW2d 143 (1982).

[3] "[E]vidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing *on any matter* which it is relevant." MCL 768.27a (emphasis added).

[4] MCL 768.27a was enacted with 2005 PA 135 and made effective January 1, 2006.

C. SERGEANT MUIR'S TESTIMONY

Defendant argues that Sergeant Muir impermissibly testified regarding the credibility of the victim. We disagree. This unpreserved issue is reviewed for plain error affecting substantial rights. *Hawkins*, 245 Mich App at 447.

It is improper for a witness to testify regarding the credibility of another witness "since matters of credibility are to be determined by the trier of fact." *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); See also *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). Defendant takes exception to the following exchange during Sergeant Muir's testimony:

> *Q*. Detective, in your opinion, has [the victim] been consistent about what she's said from Carehouse to the preliminary exam to here?
>
> *A*. Yes, from the statement she initially gave me, to the Carehouse interview, to the statement she made in both District Court and here as well.

It is clear that Sergeant Muir did not testify regarding the victim's credibility, as defendant claims. Sergeant Muir's opinion was based on the *consistency* of her statements. Therefore, the testimony did not venture into prohibited areas as described in *Buckey*.

Moreover, even if the testimony was considered improper, defendant cannot show how it affected a substantial right, considering that defense counsel successfully impeached the victim with her prior inconsistent statement regarding penetration during the driveway assault:

> *Q*. [At the preliminary examination, you were asked,] "You said that he had unzipped your pants and unbuttoned them and untied them, put his hand down there, and he's touching you with his fingers on your vagina. Was that inside or outside your vagina?" And you answered …?
>
> *A*. Outside.
>
> *Q*. Today you answered …?
>
> *A*. Inside.

Clearly, the victim's testimony was not entirely consistent with her preliminary examination testimony. Just as clear, contrary to what defendant claims, the jury likely was not swayed by Sergeant Muir's isolated opinion, when the victim, herself, admitted that her testimony was not consistent. Thus, defendant has failed to show how, assuming the opinion testimony was erroneously admitted, that the error affected a substantial right. Accordingly, defendant's unpreserved claim fails.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied the effective assistance of counsel at trial. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, 535 US at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first argues that his trial counsel was ineffective by not objecting to portions of defendant's statements being admitted into evidence. We disagree. As discussed in Part A, *supra*, defendant's statements were properly admitted into evidence. Because the statements were admissible, defense counsel was not ineffective by failing to make a futile objection. *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008).

Defendant next argues that his trial counsel was ineffective when he failed to object to the opinion testimony of Sergeant Muir. We disagree. Again, as discussed in Part C, *supra*, Sergeant Muir's testimony did not impermissibly delve into the victim's credibility. Therefore, any objection based on an improper vouching of credibility would have been futile, and defense counsel is not required to make futile objections. *Id.*

Therefore, defendant's claim fails for failing to meet the first prong of the ineffective assistance of counsel test because he never showed how trial counsel's performance, at any time, fell below an objective standard of reasonableness. Defendant also failed to meet the second prong of the test by not showing how he was prejudiced by any of counsel's acts or omissions. All of the evidence in total, which included uncontested admissions by defendant and testimony from the victim, was strong evidence of guilt. Even if counsel had acted as defendant suggests, there was not a reasonable probability that the trial outcome would have been any different.

E. *MIRANDA* WARNINGS

Defendant, in his Standard 4 brief, argues that his statements to Sergeant Muir were inadmissible because he was not provided any *Miranda*[5] warnings. We disagree.

[5] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

On October 27, 2007, the trial court conducted a *Walker*[6] hearing in order to determine whether defendant's statements to the police were admissible. The court found that Sergeant Muir gave defendant the proper *Miranda* warnings. Defendant, on appeal, essentially challenges this finding. Defendant relies on the fact there was no written waiver of those rights by defendant, and the recording of the interview failed to capture the beginning of the interview, where Sergeant Muir claims he gave the warnings. However, at the hearing, Sergeant Muir testified that gave defendant the warnings by reading from his *Miranda* card. Defendant, on the other hand, testified that no warnings were given.

Clearly, with two different versions of what happened, the resolution of this issue involved a credibility determination by the trial court. The trial court found Sergeant Muir credible, and, conversely, defendant not credible. This Court must defer to the trial court's determination regarding the credibility of witnesses. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005). Defendant's challenge to this factual finding is not persuasive. Accordingly, the trial court's finding that defendant was provided *Miranda* warnings will not be disturbed, and defendant's claim fails.

F. MRE 106

Defendant, in his Standard 4 brief, did not comply with MCR 7.212(C)(5)[7] when he grouped several questions into a single issue in his statement of questions presented for this issue. Accordingly, this Court could decide that the issue is waived and not address it. See *People v Unger (On Remand)*, 278 Mich App 210, 262; 749 NW2d 272 (2008). However, we believe that this unpreserved issue could be considered the single issue of whether the trial court erred when it admitted defendant's statement to Sergeant Muir when a complete recording was not available.[8] We hold that defendant's statement was properly admitted.

Defendant essentially claims that statements, such as the one he made to the police, are inadmissible unless every single word spoken by defendant is recounted. However, the Michigan Rules of Evidence do not dictate such a strict demand. Although defendant does not reference MRE 106, it is MRE 106 that most closely applies to defendant's argument. MRE 106 provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

"MRE 106 does not automatically permit an adverse party to introduce into evidence the rest of a document once the other party mentions part of it. Rather, MRE 106 logically limits the supplemental evidence to evidence that 'ought in fairness to be considered contemporaneously

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[6] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[7] MCR 7.212(C)(5): "Each question [in the statement of questions presented] *must be expressed and numbered separately* . . . ." (Emphasis added.)

[8] To the extent that defendant raises any other issues, they are waived pursuant to *Unger*.

with it.'" *People v Herndon*, 246 Mich App 371, 411 n 85; 633 NW2d 376 (2001). The case that defendant primarily relies on, *People v Hopper*, 21 Mich App 276, 279; 175 NW2d 889 (1970), does state that once a statement is testified to, a jury is entitled to hear the entire statement. However, *Hopper* was decided in 1970, well before Michigan's Rules of Evidence were implemented in 1978. *People v Barrett*, 480 Mich 125, 130; 747 NW2d 797 (2008). Hence, any evidentiary proclamations in *Hopper* would have little to no effect on proceedings that took place after 1978.

Defendant also claims that *People v McGillen*, 392 Mich 251; 220 NW2d 677 (1974), stands for the proposition that officers cannot edit transcripts of interviews, and their doing so makes the transcript inadmissible. We disagree. In *McGillen*, the testifying officer simply paraphrased what the defendant said. *Id.* at 263. The Court noted that this was improper: "[The officer] was not asked to capsulize the conversation and give his synopsis. He was asked what the defendant said. It is only the *defendant's* statements that may be admissible against him, not the arresting officer's editorialized version of them." *Id.* (emphasis in original). In the instant case, Sergeant Muir did not summarize, capsulize, or give a synopsis of what defendant said. Sergeant Muir corrected and edited the transcript of the interview so that it matched the *exact words and nonverbal gestures* that defendant said and made. Thus, Sergeant Muir correcting the transcript to match what actually happened is not the type of prohibited behavior that is contemplated in *McGillen*.

Thus, defendant failed to establish any error, let alone plain error, when the trial court admitted defendant's statements into evidence. Accordingly, his unpreserved claim fails.

G. WARRANT/COMPLAINT

Defendant next argues in his Standard 4 brief that his convictions should be reversed because the complaint and warrant issued after his warrantless arrest were defective and because he was not arraigned within 48 hours of his arrest. We disagree. This unpreserved issue is reviewed for plain error. *Hawkins*, 245 Mich App at 447.

MCR 6.104(D) provides the following:

> If an accused is arrested without a warrant, a complaint complying with MCR 6.101 must be filed at or before the time of arraignment. On receiving the complaint and on finding probable cause, the court must either issue a warrant or endorse the complaint as provided in MCL 764.1c. Arraignment of the accused may then proceed in accordance with [MCR 6.104(E)].

Defendant claims that the arresting officer never obtained a warrant/complaint that was signed by a magistrate, prosecutor, or a complaining witness. This assertion is baseless because the complaint *was* signed by a magistrate, prosecutor, and a complaining witness.[9]

[9] Interestingly, defendant states that an attached copy of the supposed unsigned complaint was provided with his Standard 4 brief, but none was found.

Though raised in his statement of the question presented in his Standard 4 brief, defendant does not provide any argument or support for his contention that he was not arraigned within 48 hours of his arrest.[10] Defendant has abandoned this particular issue by failing to provide any analysis or support in the text of his brief. MCR 7.212(C)(7); *People v Payne*, 285 Mich App 181, 187-188; 774 NW2d 714 (2009); see also *People v Hicks*, 259 Mich App 518, 532; 675 NW2d 599 (2003) ("A party may not announce a position on appeal and leave it to this Court to unravel or elaborate his claims."). But more importantly, a review of the record reveals that defendant was arrested on April 30, 2008, and was arraigned two days later on May 2, 2008. Because defendant provided no details regarding the actual timing of these events, he has not established the existence of any plain error.

H. COERCED VERDICT

Defendant next argues in his Standard 4 brief that the trial judge prejudiced defendant when he indicated an ending date for the trial. We disagree. Generally, claims of coerced verdicts are reviewed de novo and are reviewed on a case-by-case basis, while considering all the facts and circumstances. See *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992). This unpreserved issue is reviewed for plain error affecting substantial rights. *Hawkins*, 245 Mich App at 447.

While a trial court may impress upon the jury the propriety and importance of coming to an agreement, the trial court "should not give instructions having a tendency to coerce the jury into agreeing on a verdict." *People v Malone*, 180 Mich App 347, 352-353; 447 NW2d 157 (1989).

Defendant takes exception to the following exchange between the trial judge and a juror at the close of the first day of trial, Tuesday, October 28, 2008:

JUROR NO.3: Your Honor?

THE COURT: Yes?

JUROR NO.3: Do you think we'll be in conclusion tomorrow afternoon, or do you think this will go on till Thursday?

THE COURT: I don't think we're going to be done tomorrow. But I told you we'd be through Thursday, and I want to make sure you'll be through Thursday, that's why –

[10] MCR 6.104(A) requires that an arrested person is to be arraigned "without unnecessary delay." Any delay over 48 hours is presumed to be unreasonable. *People v Manning*, 243 Mich App 615, 628; 624 NW2d 746 (2000).

JUROR NO.3: Yeah. I just wanted to tell my boss that he probably won't see me then until Friday morning.

THE COURT: Probably, yeah.

Defendant claims that the judge's comments coerced the jury into believing that they must render a verdict by the end of the day Thursday. This assertion is without merit. The judge's comment, "But I told you we'd be through Thursday," refers to the judge's comments from earlier that day, where he stated the following:

> We think we'll be done Thursday. . . . But, in any event, whether I bring you in tomorrow afternoon or I don't, we'll be done with this case Thursday. When I say done, you'll hear all the evidence. The case will go to you as a jury where you're deliberating. Now, I cannot predict how long you're going to deliberate; that is entirely up to you. But you will hear all the evidence, all right?

Clearly, when viewing all of the remarks in context, it is apparent that the judge did not give the impression that the jury must have a verdict by the end of the day Thursday. In fact, the trial judge made this clear when he explicitly stated that the length of the jury's deliberation would be "entirely up to [them]." Therefore, the trial judge's comments do not constitute plain error because they would have had no coercive effect on the jury, and defendant's claim fails.

I. PROSECUTORIAL CHARGING DECISIONS

Defendant argues in his Standard 4 brief that the prosecution abused its discretion by charging him with both first- and second-degree criminal sexual conduct counts. We disagree.

Prosecutorial charging decisions are reviewed for an abuse of power. *People v Barksdale*, 219 Mich App 484, 487; 556 NW2d 521 (1996). That power is abused only if a choice is made for reasons that are unconstitutional, illegal, or ultra vires. *Id.* at 488. Unpreserved issues are reviewed for plain error affecting substantial rights. *Hawkins*, 245 Mich App at 447.

Defendant bases his argument on the established principle that a defendant cannot be charged with multiple counts for committing a single criminal act. See *People v Johnson*, 406 Mich 320, 330; 279 NW2d 534 (1979) (the defendant was wrongfully convicted and sentenced on multiple counts of CSC where there was evidence of only a single act of penetration). Defendant claims that he was charged multiple counts for the same offense. However, that is not what happened in this case. Here, defendant was charged with three counts of first-degree criminal sexual conduct for digitally penetrating the victim on two different occasions immediately after the July 2007 Cheboygan trip and for orally penetrating the victim in September 2007. Since these events were all separate events, the prosecutor was within his right to charge three separate first-degree CSC counts.

Defendant was also charged with three second-degree criminal sexual conduct counts, one of which pertained to defendant touching the victim's breasts after the Cheboygan trip and the other two dealt with inappropriate contact at the September 2007 birthday party (defendant touching the victim's breasts with his hands and touching the victim's back with his penis).

These touching acts were separate from the penetrating acts that defendant was accused of with the first-degree CSC counts. Accordingly, because each count in the information represented a separate, distinct criminal act, defendant failed to prove the existence of any plain error, and defendant's claim fails.

J. PROSECUTORIAL MISCONDUCT

Defendant, in his Standard 4 brief, alleges that three specific instances of prosecutorial misconduct deprived him of a fair trial. We disagree.

Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). The test is whether a defendant was denied a fair and impartial trial due to the actions of the prosecutor. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). However, unpreserved claims are reviewed for plain error, which means defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *Cross*, 281 Mich App at 738. Reversal is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *Pipes*, 475 Mich at 274. Thus, reversal is necessary if a timely instruction would have been inadequate to cure any defect. *Ackerman*, 257 Mich App at 449.

Defendant first argues that the prosecutor made improper remarks during closing arguments when the prosecutor stated that defendant, approximately twenty-four or twenty-five years ago, sexually assaulted his step-daughter, R.Y. During closing arguments, prosecutors are allowed to argue the evidence and make reasonable inferences to support their case. *People v Christel*, 449 Mich 578, 599-600; 537 NW2d 194 (1995). R.Y. testified that these assaults, indeed, happened. Defendant argues that because there were no charges filed or convictions obtained, then it should not have been allowed into evidence, and consequently, the prosecutor should not have commented on it. However, MCL 768.27a, the statue that allows the admission of the prior acts of sexual misconduct into evidence, does not have any requirement that the prior act be one that was actually charged or resulted in a conviction. MCL 768.27a; *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008). Therefore, since the evidence was properly introduced into evidence, the prosecutor was free to comment on it.

Next, defendant argues that the prosecutor impermissibly argued facts not in evidence when he stated, "Well, [R.Y.'s] mom was sexually assaulted by the same man that sexually assaulted her." The prosecutor's statement was, of course, inaccurate. The only evidence of sexual assault involved the victim and the victim's mother, R.Y. However, it is not apparent how this statement deprived defendant of a fair trial. A review of the transcript shows that the prosecutor simply misspoke when he referenced "[R.Y.'s] mom," when he either meant to say "the victim's mom" or "R.Y." The prosecutor's true intention is evident when, just a paragraph later, he compared the victim's allegations to R.Y.'s – not R.Y.'s mother's. Moreover, the trial judge instructed the jury that any statements made by the lawyers were not evidence and, in any event, the jury "should only accept the things the lawyers say that are supported by the evidence." "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Therefore, a jury would not have been persuaded that defendant assaulted R.Y.'s mother on the

basis of this isolated misstatement of the facts, and there was no prosecutorial conduct that deprived defendant of a fair trial.

Last, defendant argues that the prosecutor deprived him of a fair trial when the prosecutor discussed the concept of reasonable doubt:

> Ladies and gentlemen, I want you to use your reason and common sense. All right? Reasonable doubt doesn't mean beyond all doubt, beyond a shadow of a doubt, beyond every doubt. There can be some doubt in your mind.

But later, the trial judge instructed the jury, "And if a lawyer says something different about the law than what I say, ignore what the lawyer said and follow what I have to say." The trial judge soon after gave the instruction regarding reasonable doubt:

> And if you're not convinced after considering all of the facts of this case that the prosecution has proven each element of the offense beyond a reasonable doubt, then you must return a verdict of not guilty.
>
> And reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It's not just some imaginary or a possible doubt, but just that, a doubt that's based on reason and common sense.

Assuming arguendo that the prosecutor's comments were inappropriate, the trial judge's instructions cured any defect. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Unger*, 278 Mich App at 235. Accordingly, defendant's claims of prosecutorial misconduct fail.

K. PROBABLE CAUSE

Defendant argues, in his Standard 4 brief, that the police lacked probable cause to effectuate an arrest. We disagree.

> Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. [*People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996) (citing *Brinegar v US*, 338 US 160, 175; 69 S Ct 1302; 93 L Ed 1879 (1949), but other internal citations omitted).]

Furthermore, probable cause only requires "a probability or substantial chance of criminal activity, not an actual showing of criminal activity." *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998).

Defendant focuses too much on the taped phone conversation between him and the victim, which did not explicitly mention any penetration. However, Sergeant Muir already had the victim's written statement and had talked with her in person regarding how defendant sexually assaulted her on various occasions. The victim's written statement was not produced at trial and consequently is not available for review on appeal. However, Sergeant Muir testified

that her account of the assaults was consistent throughout the entire process. Since, the victim testified that defendant penetrated her three times, it seems that Sergeant Muir must have been told this as well. Accordingly, between the victim's statement to the police, the taped conversation, and defendant's admissions to the police, Sergeant Muir had a reasonable belief that defendant committed the crimes of first- and second-degree criminal sexual conduct, thereby possessing the necessary probable cause to legally effectuate an arrest.

L. VICTIM CREDIBILITY

Finally, defendant argues that the victim's testimony constituted insufficient evidence to support his convictions. We disagree.

Defendant brings a sufficiency of the evidence challenge on appeal, but his argument is based on challenging the victim's credibility. This Court is not to interfere with the fact-finder's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

Here, the victim did testify regarding having her breasts touched on two different occasions by defendant and being penetrated on three different occasions by defendant. The fact that some aspects of her testimony may have been inconsistent with other prior statements is not of consequence on appeal. Defense counsel brought the relevant inconsistencies to the jury's attention, and it was the jury's sole province to determine credibility. *People v Odom*, 276 Mich App 407, 419; 740 NW2d 557 (2007). Because the victim's testimony was sufficient to prove beyond a reasonable doubt that defendant committed first- and second-degree criminal sexual conduct, defendant's claim fails.

Defendant also invites this Court to establish a new rule of law, which would make it so one could not be convicted of criminal sexual conduct based solely on the testimony of a victim. We decline the invitation. First, that situation does not describe defendant's circumstances, where, in addition to the victim's testimony, there was defendant's own admissions and evidence of him sexually assaulting other young girls in his care. Second, without espousing a view on defendant's position, such a change in the law would be the province of the Legislature, which is best suited to address matters of public policy. *People v Mineau*, 194 Mich App 244, 248; 486 NW2d 72 (1992).

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens